



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2013-0023]**

**Congestion Mitigation and Air Quality Improvement Program Interim Guidance**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice of Interim Guidance; Request for Comment.

**SUMMARY:** The FHWA is issuing Interim Guidance on the Congestion Mitigation and Air Quality Improvement (CMAQ) Program (Interim Guidance). The Interim Guidance revises CMAQ Program Guidance issued in October 2008 (“2008 CMAQ Program Guidance”).<sup>1</sup> The revisions in the Interim Guidance explain changes to the CMAQ Program as a result of the enactment of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21). The Interim Guidance also contains changes to clarify the 2008 CMAQ Program Guidance. Because the Interim Guidance contains information needed for grantees to plan CMAQ-funded projects and use CMAQ funds during FY 2013, the Interim Guidance is effective on the date of the publication of this notice in the Federal Register. By this notice, the FHWA invites public comments on the changes contained in the Interim Guidance, which is available electronically at the docket established for this notice. The FHWA will consider all comments submitted to the Docket and will publish a notice of the availability of the resulting final guidance in the Federal Register.

**DATES:** This Interim Guidance is effective [Insert date of publication in the FEDERAL REGISTER]. Comments must be received on or before [Insert date 60 days after date of

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<sup>1</sup> See [http://www.fhwa.dot.gov/environment/air\\_quality/cmaq/policy\\_and\\_guidance/2008\\_guidance/](http://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/2008_guidance/).

publication in the FEDERAL REGISTER]. Late comments will be considered to the extent practicable.

**ADDRESSES:** Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or fax comments to (202) 493-2251.

Alternatively, comments may be submitted to the Federal eRulemaking portal at <http://www.regulations.gov>. All comments must include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). Anyone may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70, Pages 19477-78).

**FOR FURTHER INFORMATION CONTACT:** For questions about the program discussed herein, contact Michael Koontz, CMAQ Program Manager, FHWA Office of Natural Environment, (202) 366-2076, or via e-mail at [michael.koontz@dot.gov](mailto:michael.koontz@dot.gov). For legal questions, please contact Janet Myers, Assistant Chief Counsel for Program Legal Services, FHWA Office of the Chief Counsel, (202) 366-2019, or via e-mail at [janet.myers@dot.gov](mailto:janet.myers@dot.gov). Business hours for the FHWA are from 8:00 a.m. to 4:30 p.m.,

e.t., Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access and Filing**

You may submit or retrieve comments online through the Federal eRulemaking portal at: [www.regulations.gov](http://www.regulations.gov). The Web site is available 24 hours every day each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from Office of the Federal Register's home page at: [http://www.archives.gov/federal\\_register](http://www.archives.gov/federal_register) and the Government Printing Office's Web page at: <http://www.gpoaccess.gov>.

### **I. Background**

The CMAQ Program was established by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, Dec. 18, 1991) and continued under the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) (Pub. L. 105-178; Oct. 1998) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59; Aug. 10, 2005). Through 2012, the program supported more than 28,000 transportation projects, providing resources to the transportation environmental community in every State across the country. In the most recent authorization of the Federal-aid highway program, Congress amended the CMAQ Program, and authorized funding to support eligible CMAQ projects in FY 2013 and FY 2014 (see sections 1101, 1105 and 1113 of the MAP-21).<sup>2</sup> More than \$2.2 billion in total

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<sup>2</sup> Section 149(m) of title 23, United States Code, states that “[a] State may obligate funds apportioned under

CMAQ apportionments to the States are estimated for each year of the authorization.

The total apportioned Federal-aid highway program is authorized at just under \$38 billion for each year of the MAP-21 authorization.

This Interim Guidance updates and replaces the 2008 CMAQ Program Guidance, which covers the program as it existed under SAFETEA-LU.<sup>3</sup> The Interim Guidance continues to focus on project eligibility information, geographic area eligibility, the flexibility and transferability provisions available to States, requirements for annual reporting of CMAQ program obligations, and a discussion of the pertinent program and administrative responsibilities of Federal, State, and Metropolitan Planning Organizations (MPOs), transit agencies, and private sector project sponsors. Importantly, this Interim Guidance includes a number of discussions and interpretations of new or emphasized areas in the MAP-21. For example, the Interim Guidance provides information on the focus that MAP-21 continues from SAFETEA-LU on diesel retrofits and overall diesel emissions mitigation. In addition, the Interim Guidance outlines the policies behind the new priority set-aside for PM<sub>2.5</sub> obligations created by MAP-21 and describes implementing procedures. The Interim Guidance outlines performance management requirements for both congestion and emissions measures required by section 1203 (23 U.S.C. 150) of MAP-21. The MAP-21 also enhanced the SAFETEA-LU focus on project cost-effectiveness; these related issues are discussed in the Interim Guidance, as

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section 104(b)(2) [of Title 23] . . . .” The FHWA has interpreted the reference to section 104(b)(2), which is the Surface Transportation Program, as a drafting error. Under prior law, section 104(b)(2) was the funding authorization for the CMAQ program, and MAP-21 placed CMAQ funding in section 104(b)(4). The FHWA intends to apply section 149(m) as though the reference read “funds apportioned under section 104(b)(4) . . . .”

<sup>3</sup> The 2008 CMAQ Program Guidance is available at:

well. In 2012, the Environmental Protection Agency (EPA) revoked the 1997 8-hour ozone standard for transportation conformity purposes only. Although EPA has proposed full revocation of the 1997 8-hour ozone standard, this interim guidance does not address potential CMAQ implementation issues due to the revocation. The FHWA will provide additional guidance once EPA finalizes the revocation of that standard.

The Interim Guidance is available electronically at the docket established for this notice and is effective on the date of the publication of this notice in the Federal Register. The FHWA will consider all comments submitted to the Docket and will publish a notice of the availability of the resulting final guidance in the Federal Register.

## **II. Section-by-Section Analysis**

The main differences between the Interim Guidance and the 2008 CMAQ Guidance are described below. The FHWA invites public comment on these changes. In addition, the Interim Guidance reorganizes some parts of the 2008 CMAQ Guidance, updates references, and changes some language to improve clarity without altering the substance of the 2008 CMAQ Guidance.

### *1. Section III.B. Authorization Levels Under the MAP-21: Transferability of CMAQ Funds*

The MAP-21 changed the transfer provisions for CMAQ considerably. Prior to MAP-21, State transfer of CMAQ funds to other elements of the Federal-aid highway program was subject to a specific statutory process that served to limit such annual transfer flexibility to approximately 20 percent of a State's overall CMAQ funds (the

percentage varied somewhat by State). Section 1509 of MAP-21 removed this unique transfer provision for CMAQ. The Interim Guidance explains that, with the removal of this special provision for CMAQ, the standard transferability provisions of 23 U.S.C. 126 now apply. Under 23 U.S.C. 126, a limit of 50 percent of CMAQ program funds can be transferred each year. The Interim Guidance clarifies, however, that the section 126 transfer provision does not apply to the statutory PM<sub>2.5</sub> priority set-aside funds (discussed in Section V). In addition, the FHWA's Fiscal Management Information System now includes a separate accounting code for the CMAQ setaside, which is blocked from transfer flexibility.

## *2. Section IV. Cost Effectiveness and Priority Use of CMAQ Funds*

The MAP-21 continues the emphasis introduced by SAFETEA-LU on cost-effective projects that generate the greatest emissions reduction possible for the CMAQ funds invested. The SAFETEA-LU focus was on diesel retrofits and congestion-mitigation efforts that produced an air quality benefit. Section 1113(b)(6) of MAP-21 not only expands the priority for efficiency and cost effective project selection with a broader emphasis on projects that are proven to reduce PM<sub>2.5</sub>, but also calls for evaluation and assessment of projects. This includes the development of a series of graphs and tables that describe the various cost-benefit relationships of a cross-section of CMAQ project types. The Interim Guidance outlines these legislative priorities and discusses the intended role of these tables and other graphic representations. The Interim Guidance emphasizes that the tables and the supporting research are to inform States, MPOs, and other project sponsors about the air quality benefits derived from the wide range of projects studied and the relative costs associated with these efforts. The Interim

Guidance also offers a number of options for States and MPOs to use prior to the FHWA's completion of the tables and graphics required by MAP-21.

3. *Section V.A-B. Annual Apportionment Process for CMAQ Funds: State Federal-aid Apportionment and CMAQ Apportionment*

Under ISTEA, TEA-21, and SAFETEA-LU, funding apportionments for each State were calculated based on a formula for weighted populations in ozone and carbon monoxide nonattainment and maintenance areas. Unlike previous legislation, MAP-21 does not contain a specific statutory distribution formula for CMAQ apportionment. The CMAQ apportionments under MAP-21 are determined based on overall share of the program in FY 2009. Under 23 U.S.C. 104(b)(4), CMAQ apportionments are determined using a ratio of the State's FY 2009 CMAQ funding relative to the State's total apportioned Federal-aid highway program funding for FY 2009. The resulting ratio applies to the calculation of the FY 2013 and FY 2014 CMAQ apportionments. The weighting factors from SAFETEA-LU, shown in Table 2 of the Interim Guidance, have been carried forward through MAP-21's use of the FY 2009 apportionments to set the FY 2013 and 2014 apportionments. The Interim Guidance discusses these changes.

4. *Section V.C. Annual Apportionment Process for CMAQ Funds: Priority Set-aside for PM<sub>2.5</sub> Areas*

Section 1113(b)(6) of MAP-21 established a clear priority for PM<sub>2.5</sub> emissions reductions with respect to CMAQ obligations in 23 U.S.C. 149(k). Under the legislation, States with such nonattainment or maintenance areas are required to invest a portion of their CMAQ funds on projects that reduce PM<sub>2.5</sub> emissions. The Interim Guidance describes the legislative priority for PM<sub>2.5</sub> reductions, outlines potentially eligible project

types, including the MAP-21 focus on construction equipment and vehicles, and summarizes the interim approach to calculating the PM<sub>2.5</sub> priority set-aside. The FHWA is proposing a higher weighting factor through the rulemaking and public comment process. The FHWA will use the interim approach until the rulemaking is completed.

*5. Section V.D and F. Annual Apportionment Process for CMAQ Funds: State Flexibility and Federal Share and State/Local Match Requirements*

The Energy Independence and Security Act of 2007 amended 23 U.S.C. 120, Federal share payable, to provide temporary flexibility for States to use a 100-percent Federal share on all CMAQ projects. This flexibility was carried forward with each of the SAFETEA-LU extensions, but was not continued under the MAP-21. Consequently, the Interim Guidance clarifies that, as of October 1, 2012, Federal share requirements for CMAQ reverted to the standard provisions of 23 U.S.C. 120, which provides for an 80 percent Federal share.

*6. Section VII.A.2, Project Eligibility Provisions: Operating Assistance*

Section 1113(b)(6) of MAP-21 added paragraph (m) to the CMAQ provisions in 23 U.S.C. 149. Paragraph (m) expressly allows States to obligate CMAQ funds for operating assistance. The FHWA interprets paragraph (m) to allow the continuation of the Program's longstanding support for start-up and transition costs, but also to support additional flexibility in the timing of such assistance. Accordingly, the Interim Guidance continues to embody FHWA's interpretation that start-up and transition operating costs are eligible for funding under the CMAQ Program, but that long-term operating assistance support is not eligible because such costs are akin to maintenance and normal system operating costs that are the responsibility of the States and local governments.



The Interim Guidance also revises the 3-year approach under the 2008 CMAQ Program Guidance. The 3 years of operating assistance allowable under the 2008 CMAQ Program Guidance may now be spread over a longer time period, for a total of up to 5 sequential years of support. Grantees electing to provide operating support may spread the third year amount (an amount not to exceed the greater of year 1 or 2) across an additional 2 years (i.e., years 4 and 5) to provide an incremental, taper-down approach. The FHWA developed the option to spread the third year of assistance over a longer period (years 3, 4, and 5) to provide more flexibility to grantees. This provides for a smoother transition to more independent system operation. This new approach is designed to gradually reduce the Federal financial assistance once the activity has had an opportunity to become established. This is in keeping with the expectation that a new activity should increasingly be able to support itself through ridership growth and by procuring other sources of operating support. The Interim Guidance includes information on the eligibility of previous recipients of CMAQ operating assistance.

Subsection VII.A.2.a of the Interim Guidance includes a reference to passenger rail service as one of the types of service the States may fund for operating assistance. The FHWA previously acknowledged the eligibility of certain types of rail service in a January 16, 2002, Federal Register notice (67 FR 2278), and in a March 8, 2010, letter from FHWA Administrator Victor M. Mendez to the National Railroad Passenger Corporation. The new 23 U.S.C. 149(m) states that the CMAQ funds for operating assistance apply “in an area of such State that is otherwise eligible for obligations of such funds for operating costs under chapter 53 of title 49 . . . .” Considered alone, the phrase “otherwise eligible” could be read as a reference to funding that was provided to certain

transit operators prior to MAP-21. In reading 23 U.S.C. 149(b)(3) together with 23 U.S.C. 149(m), however, it is clear that MAP-21 did nothing to alter the availability of CMAQ funds to help start up viable new public transportation services that demonstrate air quality benefits regardless of the area in which the service is provided. The eligibility applies regardless of the size of the urbanized area or whether a particular grantee is or was previously authorized to use funding under 49 U.S.C. Chapter 53 for operating assistance.

Finally, 23 U.S.C. 149(m) states that operating assistance is allowed “on a system that was previously eligible under this section.” The FHWA interprets this statutory language to refer to those uses previously eligible for operating assistance funding under the exceptions in SAFETEA-LU sections 1808(g) through (k) and certain provisions in appropriations acts. Those uses are eligible for CMAQ operating assistance for an additional 5 years as discussed in the Interim Guidance.

*7. Section VII.F.1, Diesel Engine Retrofits & Other Advanced Truck Technologies*

The Interim Guidance discusses CMAQ eligibility for diesel retrofits under MAP-21. While SAFETEA-LU included eligibility provisions for diesel retrofit projects, MAP-21 places increased emphasis on the use of diesel retrofits. Such projects are included in the “Priority Consideration” provisions in 23 U.S.C. 149(g)(3), and MAP-21 includes diesel retrofit eligibility for projects undertaken to reduce PM<sub>2.5</sub> emissions using the PM<sub>2.5</sub> set-aside under 23 U.S.C. 149(k).

*8. Section VII.F.6.c-e, Transit Improvements: Fuel, Operating Assistance and Transit Fare Subsidies*

The Interim Guidance discusses transit-specific aspects of transit fuel assistance,

operating assistance, and transit fare subsidies. The MAP-21 does not alter the types of transit projects or the range of transit project sponsors able to receive this type of assistance. The Interim Guidance relocates the primary discussion of operating assistance to Section VII.A.2, leaving only transit-specific details in VII.F.6.d.

*9. Section VII.F.7. Bicycle and Pedestrian Facilities Programs*

The Interim Guidance explains that CMAQ eligibility is available to programs authorized in the bicycle and pedestrian programs governed by 23 CFR Part 652, with an example discussed.

*10. Section VII.F.17. Alternative Fuels and Vehicles*

The Interim Guidance explains that stand-alone fuel acquisitions outside of transit operating support are not eligible for CMAQ funding. The fuel exception from SAFETEA-LU 1808(k) continues under MAP-21, subject to the time period and other limitations that govern all types of operating assistance.

The Interim Guidance discusses the scope of CMAQ eligibility for electric vehicle charging stations and natural gas vehicle refueling stations under 23 U.S.C. 149(c)(2). The Interim Guidance reaffirms prior FHWA guidance that, consistent with 23 U.S.C. 111(a), such activities may be located in Interstate rest areas only if no fee is charged to users.

*11. Section IX.B.3. Federal Agency Responsibilities and Coordination: Tracking Mandatory/Flexibility and PM<sub>2.5</sub> Set-aside Funds*

The MAP-21 provisions on flexible funding and the PM<sub>2.5</sub> set-aside created a need for revised financial management systems. The Interim Guidance adds a description of the Fiscal Management Information System coding used to track

mandatory and flexible CMAQ spending, including the new PM<sub>2.5</sub> set-aside.

#### *12. Section IX.D. Performance Plan*

Under MAP-21, MPOs serving a transportation management area (as defined in 23 U.S.C. 134) with a population over 1,000,000 people and representing a nonattainment or maintenance area are required to develop a performance plan under 23 U.S.C. 149(l). The requirements for the plan are discussed in the Interim Guidance, together with how FHWA plans to administer the reporting requirement in 23 U.S.C. 149(l). Performance planning and performance management are key elements of MAP-21, and several parts of MAP-21 contain performance planning and management requirements that touch on activities under the CMAQ Program. Several of the provisions will be the subject of rulemaking, and CMAQ guidance will be updated as needed following the conclusion of the rulemaking proceedings.

### **III. Request for Comments**

The FHWA invites interested parties to submit comments on the Interim Guidance's implementation of MAP-21 and other changes to the 2008 Program

Guidance. The FHWA will consider these comments in developing final guidance for the CMAQ Program. Late-filed comments will be considered to the extent practicable.

**Authority: 23 U.S.C. 104(b)(4), 126, and 149.**

Issued on: October 18, 2013

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Victor M. Mendez

FHWA Administrator

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